1992

State of Utah v. Donald L. Jaeger : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	Case No. 920139
v.	:	Ct. App. No. 910132-CA
DONALD L. JAEGER,	:	
Defendant/Respondent.	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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v.	:	Ct. App. No. 910132-CA
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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals' summary dismissal of the State's appeal which challenged the magistrate's refusal to bindover and his dismissal of the information effectively deny the State any avenue for review of the magistrate's actions, a result in conflict with the State's historical right to seek review of a dismissed information and in conflict with the decisions of every jurisdiction which has addressed the issue? Did the court of appeals effectively decide an important issue of state law which has not, but should be, settled by this Court, that is: What is the appropriate method for review of a magistrate's order dismissing an information when refiling of the information is precluded under State v. Brickey, 714 P.2d 644, 647 (Utah 1986)?

2. Did the court of appeals erroneously conclude that State v. Humphrey, 823 P.2d 464 (Utah 1991), holding that a defendant is entitled to district court review of a bindover order, addressed and controlled the issue of the State's right to

seek review of a refusal to bindover and dismissal of an information?

3. Did the court of appeals' summary dismissal of the State's appeal fail to determine an important issue of state law which has not, but should be, settled by this Court, that is: Under the prima facie standard applicable to preliminary hearings, is probable cause established as a matter of law when the evidence, viewed in the light most favorable to the information, creates issues of fact and credibility to be resolved by a jury?

4. Did the court of appeals' use of a per curiam unpublished summary disposition opinion to address the State's right to seek review of a magistrate's refusal to bindover and dismissal of an information, an issue of first impression under Utah's current statutory and rules scheme, "so far depart from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision?

OPINION BELOW

The court of appeals' opinion sought to be reviewed is State v. Donald L. Jaeger, No. 910132-CA (Utah App. January 7, 1992), which amended the original opinion issued on January 3, 1992 (copies of the opinions are attached to the addendum).

JURISDICTION OF THIS COURT

On January 3, 1992, the court of appeals issued its original unpublished opinion which summarily dismissed the State's appeal for lack of jurisdiction. That opinion was

amended on January 7, 1992. A stay of remittitur was issued. The state was granted extension of time, up to and including March 17, 1992, in which to file the present petition. This Court has jurisdiction to consider the petition pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and 78-2a-4 (1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of any constitutional provisions, statutes and rules relied upon is set forth in the addendum to this petition.

STATEMENT OF THE CASE

Defendant was charged with murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1990) (R. 1). A preliminary hearing was held in Third Circuit Court, Salt Lake County, Utah (R. 17-19). The State's evidence established that defendant's live-in girlfriend, Mary Brandt, died from a gunshot wound located in her left collar bone area (T. 37). Based on the location of the wound, the angle of trajectory of the bullet, the length of the victim's arms, and the type of weapon, the medical examiner testified that the wound could not have been self-inflicted (T. 47-66). The wound was inflicted from a gun which defendant maintained in the home for "his own safety" (T. 9, 11, 68). Defendant, the victim, and the victim's young child were the only persons in the home at the time of the shooting (T. 10, 67). GSR tests revealed no gunpowder residue on the victim's hands; defendant's hands contained substances "characteristic" of gunshot residue (T. 71-

72, 89-90).[1] At the close of the preliminary hearing, defendant moved to dismiss the information for lack of probable cause. The motion was taken under advisement (R. 19).

On February 2, 1991, the magistrate issued a memorandum decision directing that the information be dismissed on the ground that the State had failed to establish sufficient probable cause to bindover defendant for trial (R. 20-38). On February 6, 1991, the court issued an order discharging defendant and dismissing the information (R. 39). The State appealed (R. 44).

The parties completed appellate briefing on November 18, 1991. The issues raised were:

> (1) Must a magistrate, in determining probable cause for a bindover, view the evidence, including any reasonable inferences, in the light most favorable to the information; and, is probable cause established as a matter of law if the evidence, when so viewed, creates issues of fact and credibility to be resolved by a jury?;
>
> (2) Applying the proper standards of review, were the magistrate's factual findings clearly erroneous and his legal conclusion that no probable cause existed in error?; and
>
> (3) What is the proper avenue for review of a refusal to bindover and dismissal of an information when the refiling of the information is precluded under State v. Brickey, 714 P.2d 644 (Utah 1986)?

Oral argument was set for January 23, 1992.

On December 18, 1991, this Court issued its opinion in

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[1] The State's opening and reply briefs contained detailed statements of facts. Since an evaluation of that evidence is not necessary to determine if this petition should be granted, the facts are only briefly summarized here.

State v. Humphrey, 823 P.2d 464 (Utah 1991), which reversed State v. Humphrey, 794 P.2d 496 (Utah App. 1990). Since the parties had cited to the latter opinion in addressing defendant's jurisdictional argument, defendant immediately moved, with the stipulation of the State, for supplemental briefing to assess the "impact of the Utah Supreme Court decision" on the jurisdictional issue (Motion and Stipulation for Supplemental Briefing, dated December 20, 1991). The parties further stipulated that the scheduled oral argument should be stricken and reset to facilitate the necessary supplemental briefing.

On January 3, 1992, the court of appeals summarily dismissed the appeal for lack of jurisdiction. The per curiam unpublished opinion contained no discussion of the issues raised except to conclude, without explanation, that Humphrey and rule 12(b)(1), Utah Rules of Criminal Procedure, mandated district court review of a refusal to bindover and related dismissal of the information. State v. Jaeger, slip op. at 1-2. Based on this erroneous assumption, the court of appeals remanded the case to the district court. Id. at 2. Four days later, the court of appeals modified its decision by remanding the case to the circuit court. Jaeger, amended slip op. at 2. The opinion was otherwise unchanged.

Because there presently exists no "new evidence or changed circumstances" to justify a refiling of the homicide information against defendant, the State is effectively precluded from seeking review, at any level, of the magistrate's refusal to

bindover and his dismissal of the information. As will be presented in the argument of this petition, this is a result found to be unacceptable by every jurisdiction which has addressed the issue.

ARGUMENT

POINT I

BY SUMMARILY DISMISSING THE STATE'S APPEAL CHALLENGING THE MAGISTRATE'S REFUSAL TO BINDOVER AND DISMISSAL OF THE INFORMATION, THE COURT OF APPEALS EFFECTIVELY DENIED THE STATE ANY AVENUE OF REVIEW OF THE MAGISTRATE'S ACTIONS; THIS COURT SHOULD NOW DETERMINE WHAT IS THE APPROPRIATE METHOD OF REVIEW OF AN ORDER DISMISSING AN INFORMATION WHEN REFILING OF THE INFORMATION IS PRECLUDED BY STATE V. BRICKEY.

The court of appeals' summary dismissal of the State's appeal which challenged the magistrate's refusal to bindover defendant and his dismissal of the information has effectively precluded any review of the magistrate's actions in this case. The court of appeals has denied appellate review; district court review is not procedurally available since no bindover order was issued; and the information may not be refiled in circuit court due to the limitations of State v. Brickey, 714 P.2d 644, 647 (Utah 1986).[2] Unless certiorari is granted, the magistrate's erroneous ruling that no probable cause exists in support of the information will remain insulated from judicial correction. This is a result not contemplated by the legislature nor sanctioned by

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[2] Once dismissed, an information may only be refiled if the prosecutor establishes that "new or previously unavailable evidence has surfaced or that other good cause justifies refiling." State v. Brickey, 714 P.2d at 647.

any other jurisdiction which has addressed the issue.

While the State's right to appeal is restricted by statute, State v. Kelbach, 569 P.2d 1100, 1102 (Utah 1977), Utah prosecutors have consistently been provided with some method of review of dismissed informations in criminal cases. United States v. Eldredge, 13 P. 673 (Utah), cert. denied, 145 U.S. 636 (1887) (recognizing territorial government's right to appeal from demurred information); State v. Amador, 804 P.2d 1233, 1235 (Utah App. 1990) (discussing state's traditional right to appeal from a quashed information and the statutory expansion to include any final judgment of dismissal); Utah Code Ann. § 77-39-4(1) (1978) (permitting the state to directly appeal from a "judgment of dismissal in favor of the defendant upon a motion to quash the information or indictment"); Utah Code Ann. § 77-35-26(c)(1) (1980) (permitting the state to directly appeal from any "final judgment of dismissal"); Utah Code Ann. § 77-18-1(2)(a) (Supp. 1991) (permitting the state to directly appeal from a "final judgment of dismissal"); and Rule 7, Utah Rules of Criminal Procedure (allowing unrestricted refiling of dismissed informations).

Prior to 1980, the State was permitted to directly appeal "a judgment of dismissal in favor of the defendant upon a motion to quash or dismiss the information." Utah Code Ann. § 77-39-4. This review was never defined as being restricted to district court orders. However, as a practical matter, it was so restricted because an information could only be filed in district

court after a magistrate had found probable cause to justify holding a defendant on the initial complaint.[3]

In 1980, Utah adopted a procedure whereby charges were initiated by information. Utah Code Ann. § 77-1-3(3) (1980). With this change, rule 7, Utah Rules of Criminal Procedure, was amended to enlarge the powers of the magistrates beyond discharging a defendant to include dismissal of the information. Contemporaneously, the State was given express and unrestricted authority to refile an information dismissed by a magistrate. Utah R. Crim. P. 7(d)(1) (1980). The State's right to appeal was also expanded beyond the traditional concept of appealing from a quashed information to now include the right to appeal from any "final judgment of dismissal." Utah Code Ann. § 77-35-26. Accord State v. Amador, 804 P.2d at 1235.

With the creation of the Utah Court of Appeals, the rules governing the State's right to appeal or to refile a dismissed information remained substantively the same, while new rules emerged to differentiate the jurisdictions of the appellate courts. Utah R. Crim. P. 7(8)(c) (1991); Utah Code Ann. § 77-18a-1(2) (Supp. 1991). The court of appeals was granted appellate jurisdiction over "appeals from the circuit courts,"

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[3] Until 1980, criminal charges in Utah were initiated by complaint. Under this system, a magistrate simply discharged the defendant if no probable cause was found to support a bindover. Utah Code Ann. § 77-15-7 (1978). If probable cause was found, the defendant was ordered "held to answer to the same." Utah Code Ann. § 77-15-9(1) (1978). Prosecution could then proceed in district court on an information. Utah Code Ann. § 77-10-3 (1978).

while this Court retained jurisdiction over appeals from "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction." Utah Code Ann. §§ 78-2-2(3)(j) and 78-2a-3(2)(d) (Supp. 1991).

From these changes, the current issue emerges. Are magistrates acting in their traditional non-adjudicative function when they dismiss informations; or, have their powers been expanded to those of an adjudicator in quashing an information? If the latter, should such orders be viewed as magistrate's orders or as orders of the court of record from which they issue? Further, if appellate review is not appropriate, under what circumstances, is the State entitled to seek review? While these issues may be raised in light of dicta in State v. Humphrey, 823 P.2d 465, 467-68 (Utah 1991), that a magistrate's order is not equivalent to a final judgment of a court of record, this Court has not directly determined the scope or nature of the State's right to seek review of a magistrate's order of dismissal.[4] (See Point II, for discussion of the scope of the Humphrey decision.)

Critical to the ultimate determination of the State's right, is the issue of the impact of Brickey on a magistrate's

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[4] The State recognizes the complexity of determining the nature and scope of the State's right to seek in review in light of Utah's current statutory and rule scheme, the legislative intent behind any conflicting provisions, and the proper judicial characterization of magistrates. This petition does not attempt to fully present or resolve these issues, but is limited to demonstrating why this unsettled question should be determined by this Court.

refusal to bindover: Does Brickey convert what might otherwise be considered an interim order into a final judgment of dismissal? Do the due process limitations of Brickey nullify the judicial review contemplated by rule 7, Utah Rules of Criminal Procedure, such that some other method of review is necessary to preserve the State's historical right to seek correction of an erroneously dismissed information? As noted by at least one commentator, to refuse to provide appellate review because of lack of "finality" of a judgment, which judgment fully precludes the State from proceeding, amounts to the "awkward and unjustified setoff of two irrational rules." Graham and Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations," 18 U.C.L.A. L. Rev. 635, 731 (1971).

Indeed, every jurisdiction which has addressed the prosecution's right to seek review of a refusal to bindover and dismissal of an information has considered the presence or absence of a Brickey-type restriction. State v. Fry, 385 N.W.2d 196, 198-99 (Wis. App. 1985) (where refiling is subject to a Brickey-type standard, the state retains the right to appeal erroneous legal conclusion); State v. Antes, 246 N.W.2d 671, 674 (Wis. 1976) (when prosecution is restricted from refiling under Brickey-type standard, any dismissal of the charges is a final order and appealable); Commonwealth v. Finn, 496 A.2d 1254, 1255 (Pa. Sup. 1985) (while a dismissal of an information for lack of probable cause is not ordinarily considered a final order since the prosecution may freely refile, it will be considered as final

and appealable where refiling is precluded due to a statute of limitations); Commonwealth v. Prado, 393 A.2d 8, 10 (Penn. 1978) (a dismissal of an information for lack of probable cause will be considered final where lower court had refused to allow refiling); Walker v. Schneider, 477 N.W.2d 167, 171-75 (N.D. 1991) (under its writ and rulemaking powers, the court adopts a Brickey standard and then construes the dismissal of information as a final order which may be appealed); State Ex Rel. Fallis v. Caldwell, 498 P.2d 426, 428 (Okl. App. 1972) (using its writ powers, the court adopts a prospective rule that the prosecution is entitled to a right of review of a dismissed information co-equal with that of defendant's right to review of bindover order); State v. Zimmerman, 660 P.2d 960, 963-64 (Kan. 1983) (where refiling is restricted, dismissal of a criminal complaint is equivalent to a final order; statue permits appeals from such orders and is not effected by the possibility that the State may refile); Morgan v. State, 675 P.2d 473 (Okl. App. 1984) (State's right to refile or appeal from dismissal are alternative modes of procedure); People v. Nevitt, 256 N.W.2d 612 (Mich. App. 1977) (where charges are dismissed, better practice is to allow appeal rather than permit de novo refiling); State v. Ruiz, 678 P.2d 1109, 1110 (Idaho 1984) (where no Brickey-type restriction on refiling, the State's remedy for a dismissed information is to refile de novo before a different magistrate); State v. Fahey, 275 N.W.2d 870, 871 (S.D. 1979) (magistrate's order of dismissal is not final order where State has unrestricted right to refile

811 (Minn. 1971) (State's right to review of dismissed charges is limited to its unrestricted right to refile the charges de novo before a different magistrate). See also People v. Mimms, 204 Cal.App.3d 471, 251 Cal.Rptr. 672 (Cal. App. 1988) (recognizing appellate courts attempts to provide review to state of magistrate's order and subsequent legislative reform allowing the prosecution to first seek reconsideration from the magistrate who dismisses an information and then permitting direct appellate review of the magistrate's refusal to reconsider);

The determination of the nature and scope of the State's right to seek review of a magistrate's refusal to bindover and dismissal of the information presents an important question of state law which has not, but should be, settled by this Court. Utah R. App. P. 46(d). Even when other jurisdictions have found no direct appellate jurisdiction, the courts have utilized their inherent writ and rulemaking powers to resolve the issue. People v. District Court, 803 P.2d 193 (Colo. 1990) (writ power of supreme court may be used to show cause why charges should not be reinstated); Commonwealth v. Prado, 393 A.2d at 10 (appeal review is appropriate where no other judicial review is available). Similarly, this Court should grant certiorari to determine this question which is of significance to both the prosecution and defense.

POINT II

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT STATE V. HUMPHREY RULED ON THE SCOPE AND NATURE OF THE STATE'S RIGHT TO SEEK REVIEW OF A REFUSAL TO BINDOVER AND DISMISSAL OF AN INFORMATION.

In summarily dismissing the State's appeal, the court of appeals erroneously concluded that State v. Humphrey, 823 P.2d at 464, both addressed and determined the nature of the State's right to seek review of a magistrate's refusal to bindover and dismissal of an information. The court of appeals' overly broad reading of Humphrey to mandate dismissal of this case is in conflict with the expressed limited holding of Humphrey and effectively determines, without analysis, an issue of state law which has not been, but should be, settled by this Court. Utah R. App. P. 46(c), 46(d).

The only issue in Humphrey was "whether, in light of recent statutory and constitutional changes associated with the creation of the Utah Court of Appeals, the district courts no longer have jurisdiction to quash bindover orders." Humphrey, 823 P.2d at 465. In holding that the district courts had inherently retained such jurisdiction, this Court expressly reserved the question of whether a quashal of a bindover order is equivalent to a dismissal of an information and failed to otherwise directly consider the ramifications of a quashed or dismissed information. This Court held only that when a defendant is bound over to district court, "the district court's authority to review defective informations includes the authority

to review defective bindover orders." Id. at 466, n.3.

While the court of appeals correctly recited this limited holding, the court failed to otherwise offer any basis for its conclusion that Humphrey compelled the dismissal of this case. By expanding Humphrey's narrow holding without analysis or explanation, the court of appeals rendered an opinion which is implicitly in conflict with this Court's acknowledgment of its own limited ruling.

Assuming arguendo that the court of appeals found some other basis in Humphrey for its decision, the court failed to offer any indication of its reasoning. While this Court's dicta in Humphrey may raise arguable issues when applied to the State's right to judicial review of a magistrate's actions, those issues are not capable of being summarily decided. State v. Gardiner, 814 P.2d 568, 572 (Utah 1991) (dicta has no precedent value and is not controlling). Accord Humphrey, 823 P.2d at 468 (earlier dicta is not controlling).

Yet, the court of appeals, with only perfunctory consideration of Humphrey, simply assumed that the State's right to review was identical to that of the defendant. While this Court may ultimately incorporate the dicta in Humphrey to limit the State's right to seek appellate review of a refusal to bindover and dismissal of an information, the issue is significant and deserves thoughtful analysis in a published opinion. In this manner, proper consideration would be given to the State's historical right to judicial review of dismissed

and/or quashed informations, the impact of any rule and statutory modifications on that right, the legislative intent behind any presently conflicting statutory provisions, and the significant variances between the procedure governing a bindover which invokes jurisdiction and a refusal to bindover which effectively revokes jurisdiction.

Unless this Court accepts certiorari, this important question of state law will remain unresolved. Utah R. App. P. 46(d). For while the State has been denied any right to seek review of the magistrate's actions in this case, the unpublished ruling provides no precedent value to future litigants.

POINT III

IN ADDITION TO THE JURISDICTIONAL ISSUE, THIS CASE PRESENTS AN IMPORTANT ISSUE OF STATE LAW WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT, THAT IS: IS PROBABLE CAUSE TO BINDOVER ESTABLISHED AS A MATTER OF LAW WHEN THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE INFORMATION, CREATES ISSUES OF FACT AND CREDIBILITY TO BE RESOLVED BY A JURY?

Because the court of appeals summarily dismissed the State's appeal for lack of jurisdiction, the court never addressed the substantive issues raised by the parties, that is: Under the prima facie standard applicable to preliminary hearings, must the evidence be viewed in the light most favorable to supporting the information; and, when so viewed, is the evidence sufficient to establish probable cause, as a matter of law, when it creates issues of fact and credibility to be resolved by a jury? While it is firmly established that the

evidence at a preliminary hearing must "establish a prima facie case against the defendant from which the trier of fact could conclude the defendant was guilty of the offense charged," State v. Anderson, 612 P.2d 778, 783 (Utah 1980), no Utah case has ruled on the specific parameters of how a magistrate should evaluate the evidence to determine if a prima facie case has been established.

It is clear that for trial purposes, courts should not weigh conflicting evidence in addressing the appropriateness of dismissals based on insufficient evidence and directed verdicts.

> Rather, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and resolve controverted facts in his favor. If the evidence and its inferences would cause reasonable men to arrive at different conclusions as to whether the essential facts were or were not proved, then the question is one of fact for the jury. Unless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the plaintiff's claim, a court should not direct a verdict for the defendant.

Cruz v. Montoya, 660 P.2d 723, 728-29 (Utah 1983) (citations omitted).

Following this same standard, other jurisdictions have concluded that under the prima facie/directed verdict standard,[5] a preliminary hearing court is mandated to view the evidence, and all reasonable inferences, in the light most favorable to the

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[5] In the preliminary hearing context, these terms are treated synonymously. LaFave and Israel, Criminal Procedure, § 14.3(a).

prosecution, and then determine if some evidence exists in support of all requisite elements of the crime. If credible evidence exists both supporting and negating an element, this presents a question of fact to be resolved by the jury and a bindover is required. People v. Superior Court (Kneip), 268 Cal.Rptr. 1, 3 (Cal. Ct. App. 6 Dist. 1990); People v. Superior Court (Boulden), 257 Cal.Rptr. 678, 680 (Calif. Ct. App. 1st Dist. 1989); People v. District Court, 803 P.2d 193, 196 (Colo. 1990); People v. Garner, 781 P.2d 87, 90 (Colo. 1989); People v. Pedrie, 727 P.2d 859, 862 (Colo. 1986); State v. Patterson, 570 A.2d 174, 179 (Conn. 1990) People v. Moore, 446 N.W.2d 834, 838 (Mich. Ct. App. 1989), appeal denied ___Mich.___ (1990); Matter of Buckner, 284 N.W.2d 507, 509 (Mich. Ct. App. 1979); State ex rel. Funmaker v. Klamm, 317 N.W.2d 458, 461 (Wis. 1982).

The determination of the proper standard to be applied in evaluating the evidence at a preliminary hearing also requires definition of the magistrate's role in considering credibility. While this Court in State v. Anderson, 612 P.2d at 786, gave tacit approval to a committing magistrate making some initial determinations of credibility, it did not address the issue of how such a requirement blends with the recognition that a preliminary hearing cannot determine ultimate issues of culpability. Other courts have concluded that "a judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible." Hunter v. District Court, 543 P.2d

1265, 1268 (Colo. 1975). Accord People in Interest of M.V., 742 P.2d 326, 329 (Colo. 1987); Matter of Buckner, 284 N.W.2d at 509; State ex rel. Funmaker v. Klamm, 317 N.W.2d at 461.

If certiorari review is permitted on the jurisdictional question, review should also be granted on this substantive issue which has not, but should be, decided by this Court. Utah R. App. P. 46(d). Regardless of the type of review permissible from a magistrate's order, the bar and trial bench would benefit from this Court's direction as to how evidence in support of probable cause should be evaluated.

POINT IV

THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT SUMMARILY DISMISSED THE STATE'S APPEAL THAT THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION BY ACCEPTING REVIEW OF THE MATTER.

As discussed, this appeal presented two issues of first impression in Utah. First, what method of review is appropriate for an order of dismissal of an information where no refiling of the information would be permitted under State v. Brickey? Second, under the prima facie standard, is probable cause established as a matter of law when the evidence, viewed in the light most favorable to the information, creates issue of fact and credibility to be resolved by a jury? Both parties diligently briefed these issues; neither party argued that any Utah case had directly resolved the issues.

Despite this, the court of appeals, without notice to the parties that it was considering summary disposition, issued

its unpublished per curiam opinion dismissing the appeal. The court then struck oral argument and ruled that the issue of supplemental briefing was "moot." Jaeger, amended slip op. at 2. Four days later, the court issued its amended opinion.

While the court of appeals has the inherent right to dispose of any case before it without full briefing and without oral argument, it is clear that rule 10, Utah Rules of Appellate Procedure, contemplates that summary reversal of a case should only be invoked when the parties have had an opportunity to respond to such a drastic procedure. (See Utah R. App. P. 10(a)-(c), requiring notice and an opportunity to respond when a party moves for summary disposition and allowing reversal only for manifest error.)

Nor can the implications of rule 10 be ignored because this appeal was dismissed for lack of jurisdiction. In the case of most dismissals for lack of jurisdiction, the issue is determined by a simple review of the record. Yet, even in those cases, the practice of the court of appeals is to give notice that summary disposition is being considered and then to grant the parties an opportunity to respond. Just as this Court recognized in issuing a reasoned published opinion in Humphrey, even when a court finds that it does not have jurisdiction, that determination, when one of first impression, deserves full appellate consideration due to its severe ramifications. Accord State v. Gardiner, 814 P.2d at 570, n.1.

In failing to permit the parties an opportunity to fully brief the jurisdictional issue in light of intervening case

without notice or opportunity for the parties to respond, and in issuing an unpublished per curiam opinion to decide an issue of first impression, the court of appeals substantially departed from the accepted and usual course of judicial proceedings. This Court should exercise its power of supervision and grant certiorari to review the appropriateness of the court of appeals' actions. Utah R. App. P. 46(c).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant the petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 17th day of March, 1992.

R. PAUL VAN DAM
Attorney General

CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing petition for writ of certiorari was mailed, postage prepaid, to Joan C. Watt, attorney for respondent, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 17th day of March, 1992.

ADDENDUM

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	AMENDED*
	)	MEMORANDUM DECISION
Plaintiff and Appellant,	)	(Not For Publication)
	)	
v.	)	
	)	Case No. 910132-CA
Donald L. Jaeger,	)	
	)	
Defendant and Appellee.	)	F I L E D
	)	(January 7, 1992)

Third Circuit, Salt Lake Department
The Honorable Michael L. Hutchings

Attorneys: R. Paul Van Dam and Christine F. Soltis, Salt Lake City, for Appellant
Joan C. Watt, Lisa J. Remal, and Richard P. Mauro, Salt Lake City, for Appellee

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Before Judges Russon, Bench, and Greenwood (Law & Motion).

PER CURIAM:

This matter is before the court on appellee's motion and stipulation for supplemental briefing and to strike oral argument.

Defendant was charged with second degree murder and a preliminary hearing was held. The court dismissed the information on the ground that the State failed to establish *probable cause to bind over defendant to district court for* trial. The State appeals.

In State v. Humphrey, No. 900434 (Utah December 18, 1991), the Utah Supreme Court held that jurisdiction to review bindover orders rests with the district court, not with the Utah Court of Appeals. The court stated that when a bindover order is issued, the circuit court judge, acting as a magistrate, determines whether there is sufficient evidence to bind defendant over for trial. If so, the information is then transferred to the

*This replaces the memorandum decision issued on January 3, 1992.

district court permitting that court to take original jurisdiction of the matter. The district court then "has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked." Id. Further, Rule 12(b)(1) of the Utah Rules of Criminal Procedure gives the district courts authority to review defects in the indictment or information.

In this case, the State appeals from the circuit court's dismissal of an information, alleging defendant should have been bound over to district court for trial. In accordance with Humphrey, we dismiss the appeal for lack of jurisdiction and remand to the circuit court. Because we dismiss the appeal for lack of jurisdiction, oral argument is stricken and the motion for supplemental briefing is deemed moot.

Leonard H. Russon, Judge

Russell W. Bench, Judge

Pamela T. Greenwood, Judge

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Publication)
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 910132-CA
	)	
Donald L. Jaeger,	)	
	)	F I L E D
Defendant and Appellee.	)	(January 3, 1992)

Third Circuit, Salt Lake Department
The Honorable Michael L. Hutchings

Attorneys: R. Paul Van Dam and Christine F. Soltis, Salt Lake City, for Appellant
Joan C. Watt, Lisa J. Remal, and Richard P. Mauro, Salt Lake City, for Appellee

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Before Judges Russon, Bench, and Greenwood (Law & Motion).

PER CURIAM:

This matter is before the court on appellee's motion and stipulation for supplemental briefing and to strike oral argument.

Defendant was charged with second degree murder and a preliminary hearing was held. The court dismissed the information on the ground that the State failed to establish probable cause to bind over defendant to district court for trial. The State appeals.

In State v. Humphrey, No. 900434 (Utah December 18, 1991), the Utah Supreme Court held that jurisdiction to review bindover orders rests with the district court, not with the Utah Court of Appeals. The court stated that when a bindover order is issued, the circuit court judge, acting as a magistrate, determines whether there is sufficient evidence to bind defendant over for trial. If so, the information is then transferred to the district court permitting that court to take original jurisdiction of the matter. The district court then "has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked." Id. Further,

Rule 12(b)(1) of the Utah Rules of Criminal Procedure gives the district courts authority to review defects in the indictment or information.

In this case, the State appeals from the circuit court's dismissal of an information, alleging defendant should have been bound over to district court for trial. In accordance with Humphrey, we dismiss the appeal for lack of jurisdiction and remand to the district court. Because we dismiss the appeal for lack of jurisdiction, oral argument is stricken and the motion for supplemental briefing is deemed moot.

Leonard H. Russon, Judge

Russell W. Bench, Judge

Pamela T. Greenwood, Judge

Rule 7. Proceedings before magistrate.

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(8) (a) A preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine the witnesses against him.

(b) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(c) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

77-18a-1. Appeals — When proper.

(1) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea;

(b) an order made after judgment that affects the substantial rights of the defendant;

(c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(2) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice; or

(f) an order of the court granting a motion to withdraw a plea of guilty or no contest.

77-1-3. Definitions—Peace officer classifications.—For the purpose of this act:

(1) "Criminal action" means the proceedings by which a person is charged, accused and brought to trial for a public offense;

(2) "Indictment" means an accusation, in writing, presented by a grand jury to the district court, charging a person with a public offense;

(3) "Information" means an accusation, in writing, charging a person with a public offense which is presented and signed by a prosecuting attorney and filed in the office of the clerk where the prosecution is commenced or subscribed and sworn to by a complaining witness before a magistrate if the offense is a class B misdemeanor or a lesser offense not requiring approval of the prosecuting attorney;

77-35-26. Rule 26—Appeals.—(a) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal stating the order or judgment appealed from and by serving a copy thereof upon the adverse party or his attorney of record. Proof of service of such copy shall be filed with the court.

(b) An appeal may be taken by the defendant:

(1) From the final judgment of conviction;

(2) From an order made, after judgment, affecting the substantial rights of the defendant;

(3) From an interlocutory order when, upon petition for review, the supreme court decides that such an appeal would be in the interest of justice; or

(4) From any order of the court judging the defendant by reason of a mental disease or defect, incompetent to proceed further in a pending prosecution.

(c) An appeal may be taken by the prosecution:

(1) From a final judgment of dismissal;

(2) From an order arresting judgment;

(3) From an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(4) From a judgment of the court holding a statute or any part thereof invalid; or

(5) From an order of the court granting a pre-trial motion to suppress evidence when, upon a petition for review, the supreme court decides that such an appeal would be in the interest of justice.

77-35-7. Rule 7—Proceedings before magistrate.—

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(c) If a defendant is charged with a felony, he shall not be called on to plead before the committing magistrate. During the initial appearance before the magistrate, the defendant shall be advised of his right to a preliminary examination. If the defendant waives his right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall forthwith order the defendant bound over to answer in the district court. If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. Such examination shall be held within a reasonable time, but in any event not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if he is not in custody; provided, however, that these time periods may be extended by the magistrate for good cause shown. A preliminary examination shall not be held if the defendant is indicted.

(d) (1) A preliminary examination shall be held in accordance with the rules and laws applicable to criminal cases tried before a court. The state shall have the burden of proof and be required to proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine the witnesses against him. If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall forthwith order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination. If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law and an order of dismissal. The dismissal and discharge shall not preclude the state from instituting a subsequent prosecution for the same offense.

77-10-3. "Information" defined.—An information is an accusation in writing in form and substance like an indictment for the same offense, charging a person with a public offense, presented and signed by the district attorney, or by the attorney pro tempore for the state, and filed in the office of the clerk of the district court.

77-15-7. Form of commitment.—The commitment for examination shall be made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect. "The within named A B, having been brought before me under this warrant is committed for examination to the sheriff of ....." If the sheriff is not present, the defendant may be committed to the custody of any peace officer.

77-15-9. Procedure on preliminary examination.—At the examination the magistrate must first read to the defendant the complaint and the depositions of the witnesses examined or making the complaint, if depositions were taken.

77-39-4. Appeal by state, in what cases.—An appeal may be taken by the state:

(1) From a judgment of dismissal in favor of the defendant upon a motion to quash the information or indictment.

(2) From an order arresting judgment.

(3) From an order made after judgment affecting the substantial rights of the state.

(4) From an order of the court directing the jury to find for the defendant.